



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**MISC APP NO. 230 OF 2016**

**DON WOODS CO. LTD.....APPELLANT/APPLICANT**

**VERSUS**

**BOAZ OUMA OKONJI.....RESPONDENT**

**RULING**

1. This is a ruling on an application by Notice of Motion dated 27<sup>th</sup> May, 2016 under Order 42 Rule 6 and Order 50 Rule 6 of the Civil Procedure Rules and sections 3A and 63(e) of the Civil Procedure Act Cap 21 laws of Kenya for orders that;

- a. This Honourable Court be pleased to stay execution of the judgment in the lower Court pending the hearing and determination of this application;
- b. This Honourable Court be pleased to grant leave to file an appeal out of time;
- c. The annexed draft memorandum of appeal be deemed filed; and
- d. The costs occasioned in this application be provided for.

2. The grounds of the Application are set out on the body of the application, the Supporting and Further Affidavits of SIMON MAINA, the Human Resource Manager of the Appellant/Applicant. In the affidavit, the Appellant states that judgment was delivered on 24<sup>th</sup> March, 2016 in the absence of both parties, which judgment was supposed to have been delivered on 11<sup>th</sup> November, 2015 but was adjourned as the trial magistrate was on leave. That Appellant became aware of the judgment on 27<sup>th</sup> April, 2016 upon perusal of the Court file and this explains the delay in filing the instant application

3. The Application is opposed by the Respondent via a Replying Affidavit of Boaz Ouma Okonji dated 20<sup>th</sup> June, 2016 wherein he states that the clerk of the trial magistrate rang all the advocates and informed them of the judgment date. Thereafter the Applicant's Advocates rang the Respondents Advocates informing them to hold on execution as they called for the payment cheques from their client. He further states that there has been inordinate and inexcusable delay in bringing the application.

4. The court has read and considered the application, the affidavits and the submissions made by Counsels for both parties. This application is mainly brought under Order 42 rule 6 of the Civil Procedure Rules and Order 50 Rule 6 on extension of time. Order 42 Rule 6 (1) sets down the requirements for granting a stay of execution of decrees which are;

a. That the application has been made without unreasonable delay;

c. That security for costs has been given; and

c. That substantial loss may result to the Applicant unless the order for stay is made.

5. The instant application was filed on 27<sup>th</sup> May, 2016 whilst the judgment was delivered on 24<sup>th</sup> March, 2016. which is quite some time. Even going by the Applicant's position that it became aware of the judgment on 27<sup>th</sup> April, 2016, I still find there was inordinate delay in waiting for more than a month to file the application. Bearing in mind that judgment had already been delivered and they were not aware, it could have been expected that they move with speed and file the instant Application. I find that the application was not filed timeously, and the delay was unreasonable in prevailing circumstances.

6. The Appellant has deponed that he is ready and willing to give security for the orders as the court may deem fit.

7. In the affidavit, the Appellant depones that if stay of execution is not granted, then the Respondent will execute the decree and the Applicant will suffer irreparable harm/loss. From the Application itself, the Appellant has not illustrated what kind of substantial loss they are likely to suffer. Infact, this is not captured anywhere in the Supporting Affidavit. However, in the submissions, the Appellant do submit that the Respondent's means of income is not known. I wish to point out that when such assertion is made in the submissions it has no evidential value as it is not made under oath

8. Order 50 Rule 6 of the Civil Procedure Rules provide that

***"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:***

***Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."***

9. The Applicant has tried to explain the delay in filing both the Appeal and the Application but as I have pointed out elsewhere in this ruling, the delay has not been satisfactorily explained but in the interest of justice, the court shall exercise it's inherent jurisdiction and allow the Appellant/Applicant to file Appeal out of time.

10. The orders of this court therefore are that the prayer for stay of execution of the judgment delivered on 24<sup>th</sup> March, 2016 is denied but the Appellant is granted leave to file Appeal out of time. The Appeal to be filed within 14 days from the date of this ruling. Costs of the Application shall abide the outcome of the Appeal.

**Dated, signed and delivered at Nairobi this 14<sup>th</sup> day of July, 2017**

.....

**L. NJUGUNA**

**JUDGE**

**In the presence of:**

..... **for the Appellant/Applicant**

..... for the Respondent